IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 6TH JUNE 2007 / 16TH JYAISHTA 1929

RSA.No. 338 of 2007()

AS.172/2003 of PRINCIPAL SUB COURT,PARAVUR
OS.442/2001 of MUNSIFF COURT,ALUVA

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: APPELLANTS/APPELLANTS/PLAINTIFFS

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1. VENKIDESH, AGED 35,
   S/O SIVASANKARAN NAIR, PALAKKATTUPUTHEN PURAIKKAL,
   NAYATHODU KARA, ANGAMALY VILLAGE.

2. SIVASANKARAN NAIR, AGED 76,
   PALAKKATTUPUTHENPURAIKKAL,
   NAYATHODU KARA, ANGAMALY VILLAGE.

3. LAKSHMIKUTTY AMMA, AGED 62,
   W/O SIVASANKARAN NAIR,
   PALAKKATTUPUTHANPURAIKKAL, NAYATHODU KARA,
   ANGAMALY VILLAGE.

BY ADV. SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM

RESPONDENTS: RESPONDENTS/DEFENDANTS

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1. VIDYADHARAN, AGED 48,
   S/O DEVAKY AMMA, PUTHENPURAIKKAL,
   NAYATHODU KARA, ANGAMALY VILLAGE.

2. MURALEEDHARAN, AGED 45,
   S/O DEVAKY AMMA, PUTHENPURAIKKAL HOUSE,
   NAYATHODU KARA, ANGAMALY VILLAGE.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 06/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Order on I.A.737/2007 in R.S.A. No.338/2007

6.6.07 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 338 OF 2007

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Dated this the 6th day of June 2007

JUDGMENT

Plaintiffs in O.S.442/2001 on the file of Munsiff Court, Aluva are the appellants. Respondents are the defendants. Appellants instituted the suit seeking a declaration of right of way over plaint B schedule property by easement of prescription and easement of necessity contending that it is the only way leading to the plaint A schedule property belonging to the appellants. It was contended that plaint B schedule property is having a width of 2 ½ meters and length of 30 meters which lies east west and joins the plaint schedule property and connect to the eastern road. It was contended by the appellants that plaint A schedule property originally belonged to the second appellant on tenancy right and under Ext.A1 settlement deed it was granted in favour of first appellant and

plaint A schedule property and the surrounding property originally belonged to the same jenmi and was severed when the jenm right of the plaint A schedule property was purchased from Land Tribunal and there is no other way to the plaint A schedule property and so appellants are entitled to get a right of way by easement of necessity over the plaint B schedule property. It was contended that appellants have been using the plaint B schedule property for the last several years as a right as an easement and without obstruction for the last several years and therefore they have prescribed a right of way by easement of prescription and respondents are not entitled to obstruct the same and therefore they are entitled to get a decree for declaration and injunction.

2. Respondents in the written statement disputed the claim. It was contended that appellants have no right of way through plaint B schedule property and it is part of their property and though appellants have been using a portion of

the property, it was not as of right but as per permission granted and respondents have no intention to obstruct the same.

3. Learned Munsiff framed the necessary issues. On the evidence of Pws.1 to 3, DW1 and Exts.A1 to A4 and B1 and B2 and C1 and C2, learned Munsiff found that appellants have no right of way either by easement of necessity or easement of prescription and they are not entitled to the decree sought for. Suit was dismissed. Appellants challenged the decree and judgment before Sub Court, North Paravur in A.S.172/2003. On reappreciation of evidence, learned Sub Judge confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the Second Appeal.

4. Learned counsel appearing for appellants was heard.

5. Learned counsel appearing for appellants did not challenge the finding on rejecting the claim for a right of way by easement of necessity. It

was argued that evidence establish that appellants have been using the plaint B schedule property as a way from 1976 atleast, as of right and as an easement and without obstruction and in such circumstances, courts below should have granted a decree for declaration of right of easement by prescription. It was also argued that existence of plaint B schedule property was not denied by respondents and what was contended by them was that appellants are using the same as per permission and in the light of the evidence on records, courts below should have upheld the case of the appellants.

6. On hearing learned counsel appearing for appellants, I do not find any substantial question of law involved in the appeal.

7. Though right of way by easement of necessity and easement of prescription were claimed, courts below negatived both the claim. The rejection of the right of easement of necessity was not challenged by the appellants in

the Second Appeal. What is now claimed is a right of easement by prescription. The courts below found that necessary ingredients constituting a right of easement by prescription was not pleaded. A reading of the plaint shows that though appellants contended that they have been using the plaint B schedule as a right for several years, there is no pleading that the said several years exceed 20 years which is mandatory to claim a right of easement by prescription. It is also pertinent to note that respondents though admitted existence of way had contended that it was being used by appellants as per a permission granted and the width of the pathway is not as claimed by appellants but only one meter. Courts below also found that appellants did not get the way demarcated as claimed in the plaint. If a decree for declaration of easement by prescription is to be granted, it could only with regard to a distinct and definite way, which is to be established by appellants. In such circumstances, in the absence

of proper pleading and evidence, courts below rightly dismissed the suit.

8. Learned counsel appearing for appellants then submitted that the dismissal of the appeal may not operate as a bar against the appellants to institute a proper suit with proper pleading, to claim a decree for declaration of right of easement by prescription. As right of way by easement of prescription claimed by appellants was negatived for want of proper pleading and for not ascertaining the actual identity of the way by its width, it is only in the interest of justice to provide that dismissal of the suit will not bar the appellants from instituting a proper suit claiming a right of easement by prescription.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006